MALAYSIA NATIONAL INSURANCE SDN. BHD.

v.

TAN KOK HUA BROTHERS CONSTRUCTION SDN. BHD.

HIGH COURT MALAYA, KUALA LUMPUR
WAN HAMZAH J
[ORIGINATING MOTION NO. A47 OF 1982]
31 MARCH 1984

***ARBITRATION**: Application to remit certain matters for reconsideration of arbitrator - Delay in application - Order 69 r. 4(1) - Whether extension of time should be allowed - Finding of arbitrator on issues - Whether should be reconsidered.*

Tan Kok Hua Brothers Construction Sdn. Bhd. ("Tan Construction") took out a workmen's compensation policy from Malaysian National Insurance Sdn. Bhd. ("MNI"). On a dispute arising out of the policy, the parties submitted the dispute to an arbitrator in pursuance of a condition in the policy. The arbitrator made an award in favour of Tan Construction. MNI applied by originating motion for an order to remit certain matters for the reconsideration of the arbitrator under s. 23 of the Arbitration Act. They also applied for extension of time for making the application to remit.

Held:

[1] In the circumstances of the case, extension of time should be allowed.

[2] The finding by the arbitrator that Anika Brokers were the agents for MNI and authorised to receive notice on behalf of MNI was a finding of fact and could not be remitted for reconsideration. No error of law appeared on the face of the award.

[3] However, the arbitrator had failed to consider the following issues at all or had considered them but inadequately:

(a) the date on which a copy of the writ was received by Anika Brokers and whether there was a delay sufficient enough to constitute a breach of the conditions of the policy, and

(b) the issues of estoppel, waiver and concession regarding the liability alleged against MNI.

[Application allowed.]

legislation referred to:
Arbitration Act 1952, s. 23.
Rules of the High Court 1980, O. 69 r. 4(1)

For the plaintiff - Ananthan; M/s. Skrine & Co.
For the defendant - Chang; M/s. Suhaimi, Khor Zulkifli & Chang

JUDGMENT

Wan Hamzah J:

Tan Kok Hua Brothers Construction Sdn. Bhd. (hereafter referred to as Tan Construction) took out a workmen's compensation policy from Malaysian National Insurance Sdn. Bhd. (hereafter referred to as MNI). A dispute between Tan Construction and MNI arose out of the policy. Pursuant to a condition contained in the policy they appointed an arbitrator and

referred the dispute for determination by him. He heard the dispute and made an award in favour of Tan Construction. By this originating motion MNI asks for an order to remit certain matters to the reconsideration of the arbitrator under s.23 of the Arbitration Act.

The arbitrator made the award on 25 May 1982. Under O. 69 r. 4(1) application to remit may be made within six weeks after the date of the award. Therefore the last date for making the application should be 6 July 1982. By notice of originating motion dated 19 November 1982 MNI also applies for extension of the time for making application to remit. I am satisfied that the delay in making the application to remit was due to the fact that soon after the award was made, Encik Dzaiddin who was the Counsel handling the case for MNI was busy making preparations for elevation to the Bench, and also to the fact that MNI had to engage new solicitors. I therefore allow extension of time for six months for making the application to remit.

The arbitrators's award was in the form of a judgment. Briefly the facts stated in the award are as follows:

1 June 1978	An employee of Tan Construction by the name of Ho Choy was injured whilst working in the course of his employment. This accident occurred during the currency of the policy.
	On the same date a letter was written by Tan Construction to Anika Insurance Sdn. Bhd. (hereafter referred to as Anika Brokers) giving notice of the accident. Anika Brokers were the insurance brokers though whom Tan Construction took out the policy.
	Anika Brokers then wrote to Tan Construction asking for full particulars. A copy of this letter was extended to MNI
26 June 1978	Tan Construction returned claim form to Anika Brokers.
16 July 1980 (or thereabout)	Tan Construction received a letter from Messrs. Teh Cheng Aik & Co., Advocates and Solicitors (hereafter referred to as Teh Solicitors) stating that they were acting for Ho Choy and enquiring whether Tan Construction was amenable to an out of Court settlement of the claim.
17 July 1980	Tan Construction forwarded a copy of that letter of Teh Solicitors to Anika Brokers.
9 September 1980	The Kuala Lumpur High Court issued writ of summons in Civil Suit No. P539/ 1980, which was filed by Teh Solicitors on behalf of Ho Choy against Tan Construction. (It appears that Ho Choy claimed damages against Tan Construction in respect of the injuries which he suffered as the result of the accident).
16 September 1980	The writ was served on Tan Construction.
17 September 1980	Tan Construction forwarded to Anika Brokers a photostat copy of the writ.
	No appearance was entered for Tan Construction to the action.
1 October 1980	Teh Solicitors on behalf of Ho Choy entered interlocutory judgment in default of appearance against Tan Construction.
	On the same date MNI wrote to Teh Solicitors acknowledging receipt of a copy of Teh Solicitors' letter which had been extended to MNI by Tan Construction and in which Teh Solicitors stated that they (Teh Solicitors) were acting for Ho Choy and enquiring whether Tan

Construction was amenable to out of Court settlement. In the same letter MNI requested Teh Solicitors for all relevant documents pertaining to Ho Choy's claim. This letter of MNI was headed "Without Prejudice.

6 October 1980 — Teh Solicitors informed MNI that interlocutory judgment in default of appearance had been obtained against Tan Construction and that they (Teh Solicitors) were in the process of filing the necessary documents in Court for damages to be assessed. Teh Solicitors also asked MNI whether the latter would be amenable to an out of Court settlement.

10 October 1980 — MNI wrote to Teh Solicitors to say that Tan Construction had not notified MNI of the service of the writ and as such had breached the policy conditions, and that MNI was not accepting liability, and suggested that Teh Solicitors should refer the matter to Tan Construction. A copy of this letter of MNI was extended to Anika Brokers.

23 October 1980 — Anika Brokers wrote to MNI to explain that although Tan Construction had posted the writ to them on 17 September 1980 they did not receive it until 11 October 1980.

29 October 1980 — MNI wrote to Teh Solicitors to enquire whether MNI could apply to set aside the judgment.

1 November 1980 — Teh Solicitors replied that they had strict instructions to object to any attempt to set aside the judgment.

8 November 1980 — MNI wrote to Anika Brokers to inform that MNI was maintaining repudiation of liability.

14 November 1980 — Anika Brokers wrote to Tan Construction enclosing a copy of that letter of MNI dated 8 November 1980, and advising Tan Construction "to take up the matter on your own immediately" and not to hesitate to contact Anika Brokers if Anika Brokers could be of further assistance.

Subsequently Teh Solicitors took out notice of motion for assessment of damages. The notice of motion was served on Tan Construction.

16 January 1981 — Tan Construction forwarded a copy of the notice of motion to Anika Brokers.

18 November 1981 — Hearing of the notice of motion was held and at the hearing a total sum of RM74,000 for general and special damages and a sum of RM5,000 for costs were agreed upon.

It appears that there was an agreed bundle of documents produced at the arbitration proceedings. The agreed bundle was not produced to this Court.

The claim of Tan Construction against MNI before the arbitrator was for indemnity under the policy in respect of the judgment sum and costs which Ho Choy had obtained against Tan Construction in that suit. MNI denied liability. For the purpose of considering this application it is necessary to ascertain what the issues were before the arbitrator. I presume that statement of claim and statement of defence must have been submitted to the arbitrator, but copies of the statement of claim and statement of defence were not produced to this Court. MNI produced to this Court only a copy of the workmen's compensation policy issued to Tan Construction and a copy of the arbitrator's award. In the award the arbitrator stated the following issues before him:

(a) MNI contended that Tan Construction had breached conditions 2, 4 and 9 of the policy and therefore MNI was entitled to repudiate liability to Tan Construction under the policy.

(b) MNI contended that notice of the accident and the claim and notice of the service of the writ given by Tan Construction to Anika Brokers was not notice to MNI under the policy.

(c) MNI contended that Tan Construction in failing to give notices of the accident, claim and service of the writ to MNI direct had committed breach of conditions 2, 4, and 9 of the policy.

In the award the arbitrator also stated the following further issues which arose from the following contentions by Tan Construction:

(d) that Anika Brokers were the agents of MNI;

(e) that by notifying Anika Brokers of the accident and forwarding the claim form, the notice of claim and the writ to them, Tan Construction had sufficiently complied with the conditions contained in the policy;

(f) that MNI had breached the terms of the said policy and had failed to discharge their duties as insurers towards Tan Construction in not taking any steps to set aside the default judgment;

(g) that MNI are estopped from repudiating their liability under the policy as they had expressly entered into negotiation with Teh Solicitors for settlement of the injured workman's claim;

(h) that MNI by entering into negotiation with Teh Solicitors for settlement of the injured workman's claim had waived whatever breaches by Tan Construction and could not rely on those alleged breaches as grounds for repudiating their liability under the policy;

(i) that MNI by agreeing to the amount of the damages to be awarded to the injured workman in the Civil Suit No. P539 of 1980 had by implication conceded to their liability for the injured workman's claim.

So there were no less than nine issues which were raised before the arbitrator and which the arbitrator had to determine, i.e. the issues (a), (b), (c), (d), (e), (f), (g), (h), and (i) stated above. Conditions 2, 4 and 9 of the policy read as follows:-

Condition 2: Every notice or communication to be given or made under this Policy shall be delivered in writing to the Company.

Condition 4: In the event of any occurrence which may give rise to claim under this Policy the Insured shall as soon as possible give notice thereof to the Company with full particulars. Every letter claim writ summons and process shall be notified or forwarded to the Company immediately on receipt. Notice shall also be given to the Company immediately the Insured shall have knowledge of any impending prosecution inquest or fatal injury in connection with any such occurrence as aforesaid.

Condition 9: The due observance and fulfilment of the terms conditions and endorsements of this Policy so far as they relate to anything to be done by the Insured and the truth of the statements and answers in the Proposal shall be conditions precedent to any liability of the Company to make any payment under this Policy.

As regards issues (a), (b), (c), (d) and (e) the arbitrator made a finding that Anika Brokers were the agents of MNI and were authorised to receive notice of accident, claim and service of writ on behalf of MNI. It appears that in arriving at this finding the arbitrator relied on the evidence of Tan Cheng Peng, an office assistant attached to Tan Construction, and of Abdul Manaf bin Shariff, the Claims Manager of MNI. Even if I would come to a different finding on the same evidence I do not think that this can be a ground for remitting the matter to the reconsideration of the arbitrator since his finding was on a question of fact and was made entirely on the basis of evidence before him. In connection with this matter no error of law appears on the face of the award. But this finding alone does not dispose of the issues. In order to dispose of the issues the arbitrator had also to make further findings. It should be remembered that on record there was evidence before the arbitrator (in the form of Anika Brokers' letter to MNI dated 23 October 1980) to the effect that Anika Brokers did not receive the copy of the writ from Tan Construction until 11 October 1980, i.e. ten days after judgment in default of appearance had been entered. There was no specific finding by the arbitrator whether Anika Brokers received the copy of the writ on 11 October 1980, or whether there was breach of the conditions of the policy on the part of Tan Construction for failure to ensure that Anika Brokers should receive the copy of the writ without delay and before judgment was entered. In my judgment the arbitrator's failure to determine these questions was an error of law which renders it necessary to remit them for his determination.

As regards issue (f), whether MNI had breached the terms of the policy in not taking steps to set aside the default judgment, the arbitrator stated as follows in the award:

> When notified that interlocutory judgment in default of appearance had been obtained against the plaintiffs (Tan Construction), the defendants (MNI) could and, in my view should have taken out an application in the name of the plaintiffs (Tan Construction) to have the default judgment set aside, if they had desired to deny the plaintiffs' (Tan Construction's) liability to the claim of the injured workman. There appeared to be sufficient ground to support the application. The Court could and, might have, allowed the application upon terms.

The arbitrator did not state what the sufficient ground was. In my opinion there was no way for MNI to successfully apply to set aside the default judgment. The judgment was a judgment against Tan Construction. There is no evidence of any irregularity in the judgment. In so far as it was a judgment against Tan Construction, the judgment was regularly and properly entered against Tan Construction because Tan Construction had failed to enter appearance. There is no way to get an order to set aside the judgment which had been regularly and properly entered. MNI would not be able to get such order on the ground that they had not been served with the writ because the claim was not made against them and the writ had not been issued against them. One point which the arbitrator had not considered was whether Tan Construction would be entitled to relief as against MNI on the alleged breach for failure to take step to set aside the default judgment, in view of the fact that Tan Construction themselves had caused the judgment to be entered by their own failure to enter appearance.

The award does not show that the arbitrator considered issues (g), (h) or (i) or made any finding on these issues. Probably he thought that it was not necessary to do so in view of his finding in favour of Tan Construction on the other issues. As he will be required to reconsider further on the other issues, it may be necessary for him to consider also issues (g), (h) and (i).

I order that the case be remitted to the reconsideration of the arbitrator, particularly the following questions:

(i) On what date Anika Brokers received the copy of the writ.

(ii) If the arbitrator finds that Anika Brokers received the copy of the writ after judgment had been entered, whether Tan Construction had breached the conditions of the policy for failure to ensure that Anika Brokers should receive the copy of the writ without delay and before judgment was entered.

The arbitrator is also required to consider and determine issues (g), (h) and (i).

Also found at [1984] 2 CLJ 181